UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION,	:	
Plaintiff,	:	Adv. Pro. No. 08-1789 (SMB)
v.	:	SIPA LIQUIDATION
BERNARD L. MADOFF INVESTMENT SECURITIES, LLC	:	(substantively consolidated)
Defendant.	:	
In re:	:	
BERNARD MADOFF,	:	
Debtor.	:	
	:	Adv. No. 10-04311 (SMB)
IRVING H. PICARD, Trustee for the Liquidation of: Bernard L. Madoff Investment Securities LLC,	:	
Plaintiff,	:	
v.	:	
ANDREW H. COHEN,	:	
Defendant.	:	

DECLARATION OF GREGORY SCHWED IN SUPPORT OF MOTION TO INTERVENE ON LIMITED COMMON LEGAL ISSUES

I, Gregory Schwed, hereby declare under 17 U.S.C. § 1746 as follows:

1. I am an attorney licensed to practice law in the State of New York and am admitted to practice in the Southern District of New York. I am a Partner in the Bankruptcy Department at Loeb & Loeb LLP.

2. This declaration is made in support of the Motion of various customer/defendants ("Customers") in avoidance actions brought by the above referenced trustee ("Trustee") to intervene in the above-referenced adversary proceeding.[1] If called as a witness, I could and would testify to the following, from personal knowledge, except as otherwise indicated:

3. Upon information and belief, Customers are defendants in 57 adversary proceedings brought by the Trustee; these complaints seek to avoid and recover, in the aggregate, about $197 million distributed to Customers by Madoff Securities.

4. Upon information and belief, all Customers are "good faith" defendants – that is, the Trustee has never alleged that any of them had any knowledge or notice of the fraud perpetrated by Madoff Securities and its principal, Bernard Madoff.

5. Customers asked the Trustee to consent to the proposed intervention, and provided the Trustee with the information he requested about the nature and number of proposed intervenors. The Trustee declined to consent. A preliminary hearing was held on September 30, at which Court allowed Customers to file this motion to intervene.

6. A true and correct copy of the uncorrected transcript of the "conference regarding certain parties' request to intervene" held before the Court on September 30, 2015 is attached hereto as **Exhibit 1.**

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[1] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Memorandum of Law in support of the Motion.

7. A true and correct copy of an email dated September 11, 2015 from Gregory Schwed of Loeb & Loeb to various attorneys at BakerHostetler is attached hereto as **Exhibit 2**.

8. A true and correct copy of an email dated September 14, 2015 from Nicholas Cremona at BakerHostetler to Gregory Schwed is attached hereto as **Exhibit 3**.

9. A true and correct copy of an email dated September 14, 2015 from Gregory Schwed to Nicholas Cremona is attached hereto as **Exhibit 4**.

10. A true and correct copy of an email dated September 17, 2015 from Gregory Schwed to Nicholas Cremona is attached hereto as **Exhibit 5**.

11. A true and correct copy of an email dated September 18, 2015 from Nicholas Cremona to Gregory Schwed is attached as **Exhibit 6**.

12. A true and correct copy of an email dated September 20, 2015 from Gregory Schwed to Nicholas Cremona is attached hereto as **Exhibit 7.**

13. A true and correct copy of an email dated September 21, 2015 from Nicholas Cremona to Gregory Schwed is attached hereto as **Exhibit 8**.

14. A true and correct copy of a letter dated September 24, 2015 from Gregory Schwed to Bankruptcy Judge Stuart M. Bernstein is attached hereto as **Exhibit 9.** (also Dkt. No. 56).

15. A true and correct copy of a letter dated September 25, 2015 from Nicholas Cremona to Bankruptcy Judge Stuart M. Bernstein is attached hereto as **Exhibit 10** (also Dkt. No. 57).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 9, 2015
New York, New York.

/s/ Gregory Schwed
Gregory Schwed

NY1372192.1

EXHIBIT 1

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-01789-smb

- x

SECURITIES INVESTMENT PROTECTION CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT SECURITIES,

LLC, ET AL.,

Defendants.

- x

Adv. Case No. 10-04311-smb

In the Matter of:

IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF

BERNAND L. MADOFF,

Plaintiff,

v.

ANDREW COHEN, ET AL.,

Defendants,

- x

United States Bankruptcy Court

One Bowling Green

New York, New York

September 30, 2015

10:06 a.m.

B E F O R E :

HON STUART M. BERNSTEIN

U.S. BANKRUPTCY JUDGE

Conference regarding certain parties' request to intervene

Transcribed by: Sherri L. Breach

APPEARANCES:

BAKERHOSTETLER
Attorneys for Trustee, Irving Picard
45 Rockefeller Plaza
New York, New York 10111

BY: NICHOLAS J. CREMONA, ESQ.
KEITH R. MURPHY, ESQ.

PRYOR CASHMAN, LLP
Attorneys for Defendants
7 Times Square
New York, New York 10036

BY: RICHARD LEVY, JR., ESQ.

SECURITIES INVESTOR PROTECTION CORPORATION
Attorneys for SiPC
1667 K. Street N.W, Suite 1000
Washington, D.C. 20006

BY: KEVIN H. BELL, ESQ.

LOEB & LOEB, LLP
Attorneys for various defendants
345 Park Avenue
New York, New York 10154

BY: P. GREGORY SCHWED, ESQ.

BAKER & MCKENZIE, LLP
Attorneys for Defendants
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

BY: RICHARD A. KIRBY, ESQ.

LEWIS MCKENNA
Attorneys for Andrew Cohen
82 East Allendale Road, Suite 6
Saddle River, New Jersey 07458

BY: PAUL LEWIS, ESQ.

PROCEEDINGS

THE COURT: Please be seated.

Madoff.

MR. SCHWED: Good morning, Your Honor. Greg Schwed of Loeb & Loeb representing various defendants in the adversary proceeding brought by the trustee.

We're here under the litigation procedures order on a preliminary conference with respect to our request to move to -- for a very limited intervention in a -- in the pending adversary against Mr. Andrew Cohen. I say limited because we're not seeking to intervene with respect to any of the trial proceedings or Mr. Cohen's attorney's presentation of facts unique to his case.

We feel our hand has been forced because, for reasons known to the trustee and his counsel, it appears as if Mr. Cohen's case is going to be the first case on which final judgments will be entered on two critical issues for our clients. And the issues involve hundreds of millions of dollars of potential swing.

The Cohen case itself is a very small case in the scheme of --

THE COURT: Not to Mr. Cohen.

MR. SCHWED: Not to Mr. Cohen, but, again, he is an individual client and the exigencies of representing an individual in a case like this are very taxing. And Mr.

Cohen's attorneys are here and they can explain the kind of pressure that's on to resolve this type of case.

One of the factors under a Rule 24 intervention is whether the interests are adequately represented by the existing defendant. And this is in no way impugning Mr. Cohen's counsel who are excellent, but, again, these are complex issues. They are both ones where many different questions can be raised about them. And when it goes up to the -- both to the District Court and to the Circuit Court -- so essentially two levels of potential appeal -- it's really not fair either to Mr. Cohen's counsel or to us to expect Mr. Cohen and his counsel to raise and fully amplify and discuss all these issues.

But --

THE COURT: What issues do you want to intervene on?

MR. SCHWED: Sure. One issue is the value issue. And --

THE COURT: That's been -- that's been decided in three different cases.

MR. SCHWED: Your Honor, quite under -- I understand that. And our client was involved in Judge -- the Judge Rakoff decision. So -- and quite thoroughly and with a very thoughtful opinion, as was Your Honor's. We weren't involved in the June 2nd or the proceedings that led

to Your Honor's June 2nd opinion. There's no question that that issue has been decided.

THE COURT: So what is there to intervene on?

MR. SCHWED: The -- it's really to preserve our rights in the Second Circuit where ultimately this issue, we would be hoping to get the Second Circuit to take a fresh look at it. And that would be --

THE COURT: I understand that. But why can't you raise that in your own cases?

MR. SCHWED: Well, we could.

THE COURT: You think I'm going to decide value for a fourth time now?

MR. SCHWED: No, Your Honor. I mean, for -- as far as we're concerned if Your Honor simply said denied on the basis of the June 2nd opinion and Judge Rakoff's prior opinion, that would be fine.

THE COURT: But how does that help you?

MR. SCHWED: It --

THE COURT: You're going to appeal a judgment in Mr. Cohen's case?

MR. SCHWED: If we're allowed to intervene we would be a party who is entitled to have that issue decided by the Second Circuit.

You see, Your Honor, I think it's a very pragmatic issue.

THE COURT: I understand the importance of the issue, but I'm certainly not going to decide it a fourth time in the context of Mr. Cohen's case. I assume it's been raised in your own cases, and when, as and if your cases are tried and you lose, you can raise that issue.

MR. SCHWED: But, Your Honor, I think the -- what we're looking at is we're trying to look at this realistically and I think that's what Rule 24 really requires, which is as a practical matter what will happen if this pure issue of law -- and that's the way it was framed and decided by Judge Rakoff and I believe Your Honor --

THE COURT: Did anybody seek interlocutory leave to appeal Judge Rakoff's decisions to the --

MR. SCHWED: We did --

THE COURT: -- Second Circuit?

MR. SCHWED: -- seek, Your Honor --

THE COURT: And what happened?

MR. SCHWED: -- if he denies interlocutory appeal. So what our concern is, it's a very practical one. If this goes up to the Second Circuit and it's -- and Mr. Lewis, Mr. Cohen's counsel, has said he certainly plans to appeal it. Unless we have --

THE COURT: Well, he hasn't lost yet.

MR. SCHWED: Pardon.

THE COURT: He hasn't lost yet.

MR. SCHWED: He has not lost yet, but, again, we're trying to speak, you know, realistically here. Assuming he does lose on the issue and he goes up on appeal, we won't have a seat at the table there. The trustee has been able to select this case and pick off and over -- I won't say overmatch because Mr. Cohen's counsel are excellent. But a case where the stakes are very minimal, relatively speaking, and now instead of embracing the chance to have a fair fight with our group of five law firms who have a lot at stake, the trustee is trying to stiff arm us and make it an unfair fight.

And there's case law, by the way, that -- in the Rule 24 context which says that that's just inappropriate from the Seventh Circuit saying that -- I can even read you an excerpt from it. It's -- this is from Security Insurance Company versus Shipawright (ph), a Seventh Circuit case from 1995. The Court said the insurance company opposed LaSalle's petition to intervene because it wanted a quick, unopposed adjudication. It wanted to play the Washington Generals and get out of town with a quick win. The District Court wisely allowed a more worthy opponent to get into and onto the Court. The Washington Generals were the Harlem Globetrotters traditional patsy opponents.

Again, this is not to say that that's the case with Mr. Cohen's counsel, but they're obviously in -- not in

a position to throw the types of resources --

THE COURT: Can I ask a question?

MR. SCHWED: Yes.

THE COURT: Suppose that trial was scheduled in Bayou (ph) --

MR. SCHWED: In --

THE COURT: -- in Bayou Ponzi Scheme case --

MR. SCHWED: Yes.

THE COURT: -- and the same issue arose, would you have the right to intervene in that case?

MR. SCHWED: Well, it's possible. I mean, the standards under 24 -- and we can go through those. I mean, I'm -- we're prepared to file the motion. But I'm certainly happy to just go through the standards.

Basically, under 24(a)(2), which would be our primary desire, intervention of right --

THE COURT: You're arguing that you have an intervention as a matter of right?

MR. SCHWED: Both, Your Honor, both intervention of right and permissive. I'm happy to go through it.

THE COURT: What statute gives you the right to (indiscernible)?

MR. SCHWED: I'm sorry.

THE COURT: What's the basis of your intervention as a matter of right?

MR. SCHWED: Okay. Let's start with the rule, which reads, "On timely motion the Court must permit anyone to intervene who claims an interest relating to the property or transaction that's the subject of the action."

Well, that language was changed in the 1966 amendments to the rules to make it quite broad. And the -- both the secondary treatises and the Second Circuit itself have said that's -- if you have an interest, and those interests can be environmental interests. I mean, there's just all kinds of questions as to whether a party actually has Article 3 standing to intervene, and yet in public interest cases that's construed broadly.

Here, it's just a flat out monetary interest. We have hundreds of millions of dollars potentially riding on the resolution of these two issues.

THE COURT: But you have your -- I come back to this. You have your own cases in which you can raise these arguments if you lose. So why do you have to intervene in this case other than to get a faster track to the Second Circuit?

MR. SCHWED: Because I think as a practical matter if this goes to the Second Circuit -- and let's just say for the sake of argument we could have made a difference had we been there, and the Second Circuit --

THE COURT: That's a big assumption.

MR. SCHWED: Pardon?

THE COURT: That's a big assumption.

MR. SCHWED: It's a huge assumption. We're not so arrogant as to say that's --

THE COURT: I'll hear from Cohen's counsel as to why he can't adequately represent his client's interests on this. But go ahead.

MR. SCHWED: All a fair point. But on that assumption if it's decided as it was by Judge Rakoff as a matter of law, then it will apply to us as a matter of stare decisis. And we mentioned -- in other words, it will really be game over, you know. In the real world there won't -- it won't matter that we didn't have a seat at the table in the Second Circuit because the trustee would be able to say with complete justification, well, you know, here it is. Here are the facts. Value, just as Judge Rakoff --

THE COURT: But that's stare decisis. If you raise the same arguments that Mr. Cohen raises and Mr. Cohen lost on those arguments, why should you have another shot at that?

MR. SCHWED: Well, the point --

THE COURT: You said you could do a better job (indiscernible) arguments and that's the basis for intervention?

MR. SCHWED: Your Honor, that's -- the case law

supports that. That's one of the criteria under --

THE COURT: Okay. How do I --

MR. SCHWED: -- Rule --

THE COURT: -- determine whether the existing parties -- and maybe this goes to the merits of the motion, but I'm curious how I determine whether the existing parties adequately represent your interests on the question that you've identified?

MR. SCHWED: Well, I can -- I think I can help a little bit. I mean, there's case law -- again, we'll cite this if we're permitted to file a brief. The Glancey (ph) versus Toutman (ph) case, 373 F.3d 656 from the Sixth Circuit in 2004. The Court ruled that an existing party did not adequately represent the absentee, the proposed intervener, because, among other things, the existing party would have a similar interest in fighting to invalidate it, but the intense -- "the intense (indiscernible) interests differs from the absentee because the absentee controls 500 times more shares."

THE COURT: So it's just a numbers game?

MR. SCHWED: No. It's really -- again, it's a practical consideration. And the word practical is used in the statute that -- let's assume that it was a $50,000 case for Mr. Cohen instead and he really -- Mr. Cohen had said, I've already spent $10,000 defending this. I really -- I

just don't want you guys to go up there and spend another nickel on this whole crazy value and prejudgment interest stuff. I can't afford it. I'm only being sued for $50,000.

THE COURT: But it's a million dollar case and he appears to be fighting it.

MR. SCHWED: Here's -- Your Honor, that's -- you're right. And that's -- but one of the criteria is indeed adequacy of representation and there is case law also from the First Circuit is to show that inadequate representation is that his interests are sufficiently different "in kind or degree from those of the named parties."

So, again, we're sort of at a loss to understand why the trustee doesn't want a fair fight on this. This issue --

THE COURT: You know, you keep saying that, but it is a fair fight. The trustee brought a case and Mr. Cohen has defended it strenuously. So why isn't that a fair fight?

MR. SCHWED: Well, for one thing, in this case we have a pattern of having consolidated briefing on issues that affect all --

THE COURT: So why wasn't this raised in the consolidated briefing? Well, actually, the antecedent debt issue was raised several times, but let me move on to the

interest issue.

MR. SCHWED: Sure.

THE COURT: Why wasn't that raised in the consolidated briefing? And what is it that you want to brief?

MR. SCHWED: Well, Your Honor, I think our position -- and we -- we don't believe this issue has been decided yet in this case. It's an important issue. We don't think there are meaningful differences among good faith defendants. And, by the way, Mr. Cohen --

THE COURT: Are you going to argue that as a matter of law the trustee cannot recover prejudgment interest against a good faith defendant?

MR. SCHWED: Your Honor, I don't actually --

THE COURT: Or are you going to argue that under the facts and circumstances of each particular case maybe he can, maybe he can't?

MR. SCHWED: Your Honor, I confess I have not thoroughly looked at this issue.

THE COURT: Well --

MR. SCHWED: But I -- but in answer --

THE COURT: Let me -- because if it's a facts and circumstances issue, then it depends on the facts of each particular case.

MR. SCHWED: Well, but does it in the same -- if

you have a good faith defendant, what are the meaningful facts? The meaningful facts are when the transfer occurred and do you measure interest from the date of the transfer or from the date that the complaint was filed, and what's the interest rate.

Now we don't believe those facts are -- there may be individual -- obviously, there are differences in facts in terms of did one defendant get its payment in 2006 and the other in 2008. Those are distinctions without differences. They're not meaningful, we don't believe, for the inquiry about prejudgment interest.

What is -- what is meaningful is, are these good faith defendants, and all of our clients are good faith defendants. Mr. Cohen is a good faith defendant. And then essentially legal issues: Do you measure interest from the date of the transfer in setting with the good faith defendant or from the date of the demand; is it appropriate in this setting to ask for prejudgment interest at all from a good faith defendant; and what interest rate do you use. It's difficult for us to see what different criteria would apply here.

I mean, you can say, yes. These defendants are different because they got their money in 2004 and you -- these other guys got their money in 2006. But how does that have any effect on the legal principles that drive whether

or not to grant prejudgment interest. We don't see it. And certainly the trustee hasn't raised any point to that effect.

And, in fact, the only case we cite in letter that I sent to -- that our group sent to the Court was the Oneida Nations case, a Second Circuit case from 1984. There were only two issues that we cited that case for and the trustee doesn't address either one of them. The first was that the stare decisis effect of an appellate case is by itself sufficient grounds for intervention of right. That's --

THE COURT: But this case I'm just going to report and recommend. It's not going to have any stare decisis effect. Objections can be filed in the District Court and which they novo review. So there's no stare decisis effect.

MR. SCHWED: But if we don't at least preserve our rights to intervene at the Bankruptcy Court level, there's a good chance that at the District Court level, let alone the Second Circuit level they'll say, sorry, you have to have preserved your rights at all level or you -- levels or you waive it.

THE COURT: So if I deny your motion, haven't you preserved your right? Then you can seek to -- for leave to intervene when, as and if there are objections and responses to it, proposed findings of fact and conclusions of law.

MR. SCHWED: Well, Your Honor, we would prefer

that we have the right to intervene. We think that's the right ruling under the circumstances.

THE COURT: All right. Let me hear from --

MR. SCHWED: Certainly.

MR. CREMONA: Your Honor, if I may --

THE COURT: Wait. Let me hear everybody from this side.

MR. CREMONA: Well, Your Honor, if I may, that was a lot of ground covered. I would like to rebut some of those points before everyone gets an opportunity to speak if --

THE COURT: Well --

MR. CREMONA: -- Your Honor --

THE COURT: Well, then you're going to be up and down. Let me hear --

MR. CREMONA: I --

THE COURT: -- if anybody has anything to add.

MR. KIRBY: Go ahead. You -- please. You're counsel.

MR. LEWIS: Yes, Your Honor. I am counsel for Andrew Cohen. And we join in this request for intervention.

THE COURT: All right. Tell me why you can't adequately represent the interests of your client, I guess, and everybody else on --

MR. LEWIS: I don't --

THE COURT: -- this (indiscernible).

MR. LEWIS: I don't think -- I think this whole thing is a tactical attempt on the part of the trustee. My client --

THE COURT: It sounds like a tactical attempt to get to the Second Circuit on the first case by everybody else. That's what it sounds like.

MR. LEWIS: So we're going to be the test case. My client, okay --

THE COURT: Well, some -- I told you when you -- the first time you came here, somebody's got to be first.

MR. LEWIS: Someone's going to be first.

THE COURT: Right.

MR. LEWIS: Someone has to be first in all the other issues, Your Honor. Okay. But on all --

THE COURT: Well, a lot of those --

MR. LEWIS: -- the other issues like --

THE COURT: -- a lot of those issues --

MR. LEWIS: -- the two-year issue --

THE COURT: A lot of those issues have been decided. I'm not going to --

MR. LEWIS: Yes. They have been decided, but they've been decided by collective consolidated briefs as Your Honor has indicated. This way --

THE COURT: Okay. But --

MR. LEWIS: -- this way, Your Honor, we are going to be the only person, okay, the only party. We're going to go up to the -- we're going to go up to Judge Rakoff. Judge Rakoff is going to give us a decision on the value and then we go to the Second Circuit --

THE COURT: You got the -- you got his decision on value.

MR. LEWIS: Fine. But we have -- but we have to wind our way through the Court.

THE COURT: I understand all that. But tell me why you can't adequately represent everybody's interest on the --

MR. LEWIS: We --

THE COURT: -- question of whether or not fictitious profits are --

MR. LEWIS: We've been representing --

THE COURT: Will you let me finish?

MR. LEWIS: I'm sorry, Your Honor. I'm sorry, Your Honor.

THE COURT: Tell me why you can't adequately represent the interests of everybody on the question of whether the payment of fictitious profits are supported by consideration, antecedent debt or otherwise.

MR. LEWIS: Okay. Let me explain. We've been representing Andrew Cohen since the case began. Okay. We

have been -- we have charged him approximately $25,000 in five years of litigation. Okay. We are now looking at proceedings that are probably going to be in the hundreds of thousands of dollars. We don't -- he doesn't have the capacity to do that. Not only have we tried to --

(Phone rings)

MR. LEWIS: I'm sorry, Your Honor.

Not only do we not have the capacity, he hasn't even paid that money.

And these people -- these people from the trustee, they understand that. We went through this mediation. They know the condition he is in. Yes, he has some money, but he worked for it. He worked for Madoff. He worked on the trading desk. He's a good faith defendant. He left the company back in 2002. He wanted to go into a different lifestyle. He really was not working in any kind of money-making occupation. All he is right now is an adjunct professor on a part-time basis in a university down in Virginia.

He doesn't have the wherewithal and we don't have the wherewithal to spend a quarter of a million dollars or something in that range from here on in all the way up to the Second Circuit. I don't think it's fair to us. I don't think it's fair to Mr. Schweb's client or the other 20 clients that are listed or the other hundreds of clients

that are involved because when we go up to the Second Circuit, these issues are going to be stare decisis with these people. And that's --

THE COURT: Well, it will be more than that depending on how the Second Circuit decides it.

MR. LEWIS: It will be worth -- well --

THE COURT: Because that's stare decisis to the Second Circuit. The Second Circuit is reviewing the decision of the District Court.

MR. LEWIS: They're -- yes. They're reviewing the decision and what they -- and the holding of Judge Rakoff is going to be what's at issue.

(Phone ringing)

MR. LEWIS: I'm sorry, Your Honor.

THE COURT: Would you turn off your phone, please?

MR. LEWIS: Yes. I certainly will. I don't even know why it's on.

THE COURT: Go ahead.

MR. LEWIS: All right. So I -- I -- these issues are going to be -- the issue that we're going to be deciding, that's going to be decided for us, is going to be decided by the Second Circuit. We're the first one. Okay. Do you think the Second Circuit is going to make different decisions for different people on the question of antecedent debts or value or taxes or any of these --

THE COURT: Probably --

MR. LEWIS: -- offsets?

THE COURT: Probably not on the legal issues.

MR. LEWIS: Why not? The legal issue is whether this -- it's only principal is value or whether there are other offsets under state law that are in question here. And we're entitled to make those things.

So what am I -- what am I going to do during the trial? We're going to offer proof. They're going to deny it. I understand, Your Honor. We're going to go up to Judge Rakoff. He may go through the same proceeding. I don't know exactly what kind of proceeding he's going to have. And then I'm going to go to the Second Circuit. And I don't know how long we can go on with this case. I mean, but we will. We now will because we'll do it for them as well as for ourselves.

THE COURT: Well, are they going to pay you to do it?

MR. LEWIS: Will they what?

THE COURT: Are they going to pay you to do it? What's going to --

MR. LEWIS: No. No one has --

THE COURT: -- (indiscernible) --

MR. LEWIS: No one has said they're going to pay me anything.

THE COURT: All right.

MR. LEWIS: In fact, it may work the other way. But --

THE COURT: Your clients are going to pay them?

MR. LEWIS: Maybe. I don't know. But we -- it's ridiculous that these people cannot intervene when all the other issues, all the other issues have been decided and argued on a collective basis allowing the group of defendants in this case to have a common voice. There are common issues in this.

THE COURT: But they want to intervene at least on the antecedent debt issue on which they've already been heard. So what's -- what would the purpose be of their intervening on the antecedent debt issue other than to have an immediate right to appeal, if that's the case from an adverse judgment by the District Court because I can't enter a final judgment --

MR. LEWIS: They'll --

THE COURT: -- in this.

MR. LEWIS: They'll be able to participate at -- in the proceedings before Judge Rakoff which may be fairly limited. I understand that. But the -- Judge Rakoff, actually, he said he -- there were several issues that he didn't even address because he hadn't withdrawn the reference. So those issues may -- may come up before Judge

Rakoff depending on how he feels about that.

I understand that the overwhelming argument is that this is SIPA. This isn't bankruptcy. This is SIPA. So we -- we take principal and that's the only offset you can get. That's not the only offset for people who've -- who are the victims of fraud in New York State. And we are the victims of fraud. And my client is the victim of fraud. And my client doesn't have the money because (indiscernible) what he had is gone. His pension fund, he worked for this company. This was his pension fund. This is the only money he was going to have.

THE COURT: All right. Thank you.

Mr. Kirby.

MR. KIRBY: Thank you, Your Honor. Richard Kirby from now Baker & McKenzie. Thank you, Your Honor.

There are two issues that I would like to emphasize here. The group is seeking to intervene on a common legal issue, which is a point that we raised back in February of 2014. And what we said to Your Honor at that time, and you may recall the hearing that was -- I think it was on Valentine's Day of 2014, that we raised the issue because it was important to the group that we be heard on common issues.

At that time the trustee agreed that on common legal issues they should be heard. We're seeking a right to

inter -- to file a motion to intervene, both -- and brief the issue of our right to intervene both under intervention of right as Mr. Schweb identified for the Court and under 24(b), permissive intervention because of a common legal issue.

And the two common legal issues are the question of value. With all due respect, Your Honor, I think it needs to be reconsidered in light of --

THE COURT: I'm not going to reconsider it unless you show me that there's a -- some authority that has since been decided.

MR. KIRBY: Okay. Your Honor --

THE COURT: But you don't have to argue that now. I'm just --

MR. KIRBY: I'm not going to argue the point now --

THE COURT: I'm just telling you -- let me just stop you. I just re-read my decision.

MR. KIRBY: Right.

THE COURT: I spent 16 pages talking about antecedent debt and I'm just not going to reconsider that unless something new has been decided that's highly persuasive or mandatory authority.

MR. KIRBY: Okay.

THE COURT: So you've had your day in court on

that.

MR. KIRBY: All right. With due respect then, Your Honor, this case, as you said, is going to be on post-findings of fact and conclusions of law. We'll go to a District Judge. It will not be before Judge Rakoff and the reason is, is because the trustee has taken the position that on other issues in which Judge Rakoff has withdrawn the reference, he was the judge of original jurisdiction and, therefore, it's going to go to a different district Judge. We want to be parties to that proceeding. The first step in that process is to seek leave to intervene here now so that we have an opportunity to be heard before a different district judge on an issue that is an issue of first impression.

Now this is an issue of first impression in the SIPA case. And the issues are very different from issues -- case like Bayou and Dunell (ph), and the reason is, is because these were customers that were broker/dealer, conceded good faith customers of a broker/dealer.

And, therefore, we think that we should be entitled to at least file that motion. You should consider it in due course. We would do it on a timely basis so that we can be heard if -- at the trial. We're prepared to file the -- that motion by the end of the week if the Court asks for it on that kind of schedule so you will have an

opportunity to consider the motion.

THE COURT: Now how many motions are going to be filed, like how many briefs am I going to get on this issue?

MR. KIRBY: There's going to be one consolidated brief from our group that would --

THE COURT: So I'm not going to get another 20 or 30 briefs like I got on the omnibus motion?

MR. KIRBY: Your Honor, we reached out to all of the members of the common defense group that we are aware of and it will be a single brief on the question of -- on the question of intervention, which is the first step in the process because we think we're entitled to be a party before the District Court on a common legal issue. And we think -- and if the case -- and if we cannot persuade the District Court to -- then we think that we're entitled to be heard before the circuit as a party.

I just want to emphasize something on the issue of interest, prejudgment interest which the Court raised a question about. That's not an issue that has been decided in this case. There are two, what I view fundamental legal issues on that question, the question of interest rate, and the timing. Everything else is going to be a factual issue. Okay.

But the interest rate, whether that interest rate is, as the trustee claims, the New York State rate, we're

seeking the federal post-judgment interest rate which is what's -- you know, we think is the proper answer to that question, and the timing as to whether it comes from the date of the demand or some earlier prompt. Those are issues that are -- will be a first impression. We also think it would affect everybody and it's a common issue.

And so we go back to the issue -- go back to the point that we raised back in February 2014. We ask the Court for an opportunity to be heard on common legal issues.

THE COURT: All right. Let me --

MR. KIRBY: Thank you.

THE COURT: Let me hear (indiscernible).

MR. LEVY: I'm sorry, Your Honor. I have one point to add to Mr. Kirby's comments. Richard Levy from Pryor Cashman.

We've all been involved in cases in which there has been numerous avoidance actions brought by a trustee. I've been involved in plenty. I'm sure Your Honor is aware of plenty in which a common set of procedures is established at the outset so that common issues will be handled on a common basis in order --

THE COURT: Which has been done in this case.

MR. LEVY: It has not been done here, Your Honor. It's been done on an ad hoc basis by motions to various courts. It hasn't been done before you.

Back in 2010 when the trustee was before Judge Lifland and establishing the litigation procedures order before any of us was a party to this proceeding, there were questions in the proceeding before Judge Lifland about whether or not matters should proceed on a consolidated basis. I would like to read to you Mark Hirschfield, Mr. Cremona's partner, his comment to Judge Lifland near the end of the hearing because I think it's telling about the trustee's position here.

"One thing is" -- and this was in the hearing that was held on November 10th, 2010 at pages 50 and 51:

"One thing in terms of the coordination of briefing and whatnot, there's nothing in these procedures that prevents a group of defendants from getting together to file a common motion or a common briefing on these issues. And, in fact, we agree that might make sense. We may use that ourselves on certain issues with regard to summary judgments.

"So these procedures don't preclude it. And we think if they want to do it that will be fine to file common motions to dismiss or common summary judgment motions or likeness."

That's exactly what we're asking --

THE COURT: You're not seeking to file a motion to dismiss or a summary judgment --

MR. LEVY: We are asking --

THE COURT: -- you're asking to --

MR. LEVY: -- to participate in --

THE COURT: -- you're seeking to --

MR. LEVY: -- dispositive proceedings, Your Honor.

THE COURT: Let me finish. You're seeking to intervene in somebody else's trial that's about to go forward.

MR. LEVY: That's exactly right, Your Honor --

THE COURT: It's different.

MR. LEVY: -- on dispositive issues. And, in fact, Your Honor, we have different twists to the antecedent debt issues that have been raised previously and will be raised hopefully in the next proceedings. We'll get into those in the intervention motion. But there are twists that neither Your Honor nor any other court has yet ruled upon. And we think it's appropriate that we have an opportunity and that they be heard so that they can be addressed on a consolidated basis.

THE COURT: Why weren't they raised previously?

MR. LEVY: Your Honor, nobody has addressed the issue of whether or not an obligation owed by the debtor that existed before 2002 that is beyond the reach of any avoidance statute, how that obligation is treated in the context of a defendant's defense that it constitutes value.

Nobody has address that issue. You haven't. Judge Rakoff didn't. No other judge has.

THE COURT: But does that issue arise in Mr. Cohen's case?

MR. LEVY: It will, Your Honor.

THE COURT: I thought -- I thought that all of the transfers occurred in 2007 or 2008.

MR. CREMONA: If I may, Your Honor, there are no obligations counts present in the complaint in the Andrew Cohen case. Those issues will not arise. It's --

MR. LEVY: If there was --

MR. CREMONA: That's irrelevant to that proceeding.

MR. LEVY: If there was an account opened prior to an avoidance period and it constitutes an obligation and it's beyond the reach of an avoidance, what is its effect, Your Honor? That --

THE COURT: What is --

MR. LEVY: What is the effect, Your Honor, of that obligation? That is an issue that must be decided.

THE COURT: I don't think I understand you right.

All right. Let me hear from the trustee at this point.

MR. CREMONA: Thank you, Your Honor. Nicholas Cremona, BakerHostetler on behalf of the trustee.

At the outset I would say thank you, Your Honor, for accommodating us on such short notice. A lot of ground was covered so I would appreciate a little latitude in responding.

One of the things that my colleague, Mr. Levy, just raised is a transcript from the November 10, 2010 hearing. I would like to give Your Honor a copy if you would like because I think it's relevant to some of the things that Mr. Levy just said, some of which are that this was done on an ad hoc basis. It was done, you know, without participation of these folks and these guys weren't in the case yet.

I think you can, just by perusing the transcript, see that Greg Schwed and Loeb & Loeb were present. SNR Denton was present. Milberg, LLP also present, here a signatory to the letter was present at that hearing.

I also would point out to Your Honor that at Docket Number 3109, Greg Schweb filed an objection to those procedures.

Similarly at Docket 3112, a Ms. Nevel (ph) of SNR Denton, also a signatory to this letter, objected to those procedures.

And lastly at Docket Number 3113, Mr. Landers (ph) of Milberg, LLP filed an objection to those procedures. And part of that objection, Mr. Landers and Milberg attached

competing avoidance procedures.

So to say that this was done on an ad hoc basis without the input of many parties is just untrue. And Judge Lifland, after careful consideration, entered that order and those procedures, taking into account the various arguments made by parties and tailored those procedures to reflect those concerns.

So -- and I think we -- you know, to say that that was entered lightly is just not true. And the fact of the matter is that was entered at a time when we had a thousand avoidance actions and it was contemplated as a way to administer those cases in a fashion that would work and, frankly, Your Honor, it has worked.

And when I went back to look at the transcript from the 2/14 hearing, as Mr. Kirby pointed out, at that point in time we were discussing having 800 avoidance actions. As we stand here right now today we have 515 and that's as a result of those very procedures that they now seek to circumvent that are working quite well and have allowed us to resolve over 300 cases --

THE COURT: Well, they're not seeking to circumvent the procedures. They're just seeking leave to intervene in the trial and that's the issue before me.

MR. CREMONA: Well, Your Honor, respectfully --

THE COURT: They're following procedure. They're

--

MR. CREMONA: Well, respectfully, though, the procedure is that the cases should proceed on their own track as Your Honor also said at 2/14, and that would mean that each case should complete discovery, go to mediation, have a failed mediation and then be scheduled for trial.

I would like to also address, which I took umbrage with two statements by my colleagues that we've handpicked this case. That's just flat untrue, Your Honor. The cases have proceeded at a pace under the procedures.

Mr. Cohen, unlike my other colleagues, chose not to file multiple motions and did not get three prior bites at the apple. His case proceeded as -- on parallel tracks. He completed discovery before them. They've delayed their cases. That's why they're not going first. That's the result of them participating in Rife (ph) in 2012 and that's Milberg, Pryor Cashman and Denton.

All of those cases, as Your Honor noted in your good faith opinion on June 2 -- as you said you talked extensively -- are bound by the law of the case on antecedent debt. But yet they want a fourth bite at the apple now today.

So all of those parties participated in -- on multiple funds again in the antecedent debt matter and then again in the omnibus proceeding before you.

I think it's also important to focus on, I took a look at the 57 cases that they're seeking to join to this proceeding. They are at various procedural postures, 26 of which were party to your omnibus proceeding, just answered either in August or September; 20 of them don't even have a case management order on file. They're not in discovery.

Now this brings us back to our conversation that we had on 2/14/14 when --

THE COURT: Valentine's Day.

MR. CREMONA: -- Your Honor said -- what's that?

THE COURT: Valentine's Day.

MR. CREMONA: Exactly. When Your Honor said this case simply can't proceed at the pace of the slowest case. That is precisely what your -- I would assume you were concerned about. We're here 18 months later and we have cases that are in the (indiscernible) stages trying to dictate the pace of the case that's been trial ready since March.

THE COURT: Well, they're not going to intervene in the trial of the case.

MR. CREMONA: But -- sorry.

THE COURT: So -- and that's -- and that I wouldn't allow. They just want to intervene and essentially what -- it probably would be post-trial briefing depending on the outcome on limited issues.

MR. CREMONA: Just to touch on that, Your Honor, I think, as Your Honor already noted, we're not revisiting antecedent debt so that eliminates the one issue --

THE COURT: But Mr. Levy thinks we are.

MR. CREMONA: Well, as Your Honor pointed out, I think he's had three opportunities to raise these unique twists that he eludes to that no one else knows about and hasn't done so at this point. I would argue they're waived.

And I would argue if he wants to raise them, then he has to put forth 57 different factual scenarios that would demonstrate why the antecedent debt law of the case doesn't apply. And if he wants to do that, that would cause an inordinate amount of prejudice and delay to the trustee and the net loser victims, and I don't think he can do it in the manner he's saying by one consolidated brief.

And that brings me to -- Your Honor, to the prejudgment interest issue which I would like to focus on something that Your Honor said. It is a -- I mean, as Your Honor noted in the Telegin (ph) case, it is a factual determine -- it's based -- whether a prejudgment interest is appropriate in a case is based on the facts and circumstances of that particular case.

My understanding is that Your Honor would consider, among other things, whether that defendant was unjustly enriched and whether it -- a future factor would be

whether it would promote settlement.

Now those facts and circumstances as to Mr. Cohen and what he did with the transfers from BLMIS and whether he invested that and made $2 million that we don't know about would be relevant to that determination in that particular case. And unless these folks want to put forth 57 other scenarios --

THE COURT: Well --

MR. CREMONA: -- then how can we --

THE COURT: No. I wouldn't allow that. But as I understand it, they want to intervene and argue that as a matter of law, for example, you must -- you can only collect the federal judgment rate, not the New York State interest rate, which would apply to all cases regardless of the outputs.

MR. CREMONA: I understand that point, Your Honor. I think the -- there's another problem with that.

THE COURT: Let me ask you a question. Are you going to seek -- do you care about interest in this case?

MR. CREMONA: My -- you just took the point from me, Your Honor, is I think it's completely premature. We haven't discussed whether we would brief that, whether it's -- if it is relevant and if we get to that point. But we're not there yet. So I think that also belies their request which is premature.

And if I could, Your Honor, I would just also touch upon the fact -- well, I also want to focus on one other transcript that -- where we had the same discussion with Mr. Kirby and Your Honor on 4/9 when they last tried to intervene on the discreet issue of SIPA 78fff(2)(c)(3). And Your Honor said to Mr. Kirby, "Issues will arise at every turn." I have a copy of that transcript and I'm happy to furnish it to the parties. "Issues will arise at every turn. Where does it stop?"

So here we are, you know, a year and a half later and where does it stop, Your Honor? I mean, there always are going to be issues that have to be decided and unless you are precluded from deciding an issue until the last defendant is heard on that issue, these cases can't move forward.

And, again, I'm back to allowing them to proceed at -- the way they have under the procedures that are in place has resulted in a tremendous amount of progress and allowed us to make significant recoveries for the net loser victims. And to -- to turn that litigation procedures on -- order on its head now would do tremendous damage to that and severe prejudice to those victims, which I think is a factor that Your Honor should consider in -- under permissive intervention under 7824.

So, again, I think one of the factors that was --

one of the things we did not hear and Your Honor asked and I still did not hear how their interests are not adequately protected or preserved by Mr. Cohen's counsel. And, in fact, I think Mr. Lewis even admitted they're going to take this all the way to the Second Circuit. So why aren't they adequately protected and preserved. Unless they're going to raise something that's entirely different factually that would require a factual record, then they are adequately protected.

And if they're not and if what they want to do is, in fact, do that, then we will be severely prejudiced because even as Your Honor knows, we may get one brief that deals with 57 different cases, but from your experience with the omnibus proceeding, that delayed matters extensively in terms of having to deal with 230 motions as opposed to what we started out with, 45.

And back to what Mr. Kirby said on 2/14, what we talked about there on a consolidated briefing actually did happen. That happened in your omnibus good faith proceeding to wrap things up once and for all. But yet again that wasn't good enough. The ruling isn't what they want, so they want to reconsider the issue yet again. And I would submit to Your Honor we can't have a fourth reconsideration of antecedent debt.

THE COURT: My sense is, at least from Mr. Schweb

said, not necessarily what Mr. Levy said, that they're not really looking for reconsideration so much as a fast track to the Second Circuit.

MR. CREMONA: Again, Your Honor --

THE COURT: The question is whether that is an appropriate reason to intervene.

MR. CREMONA: Is that not a procedurally improper mechanism as you noted. Again, if there's any gamesmanship going on it seems that to try to make that happen as opposed to letting these cases proceed at pace.

Another factor that they didn't address is they're not prejudiced in any way whereas we would be tremendously prejudiced. They, as you said, have had their day in court on antecedent debt. They will have their day in court in their various adversary proceedings on prejudgment interest and they can say why it is or isn't appropriate in that particular case to the extent we aren't able to resolve those cases through the procedures that are in place, through an effective mediation or otherwise. And I would submit that those procedures should made -- be maintained.

And just -- I mean, in closing, Your Honor, I think there are -- if I could just look at my notes because there was a lot of ground covered.

(Pause)

MR. CREMONA: You know, and there was a fairness

issue raised, Your Honor. You know, I would again say what's not fair here is to prevent further delay and allow -- and preventing us to allow a return to net loser victims. That's where the prejudice lies.

In closing, I would just say that as I mentioned the litigation procedures orders were -- order was entered after careful consideration by this Court. It has resulted in tremendous progress in moving this case forward. I think to allow these defendants to circumvent or to change the nature of it is to allow them to supplant the judgment of this Court --

THE COURT: But they're not changing the nature of it. They're just looking to in -- for leave to intervene.

MR. CREMONA: Well, they're skipping all the processes that are embedded in the order. They're saying, we don't think we should go through discovery. We don't think we should go through mediation. We think we should fast track the case to the Second Circuit.

THE COURT: Well, they still have to try the facts of their cases.

All right. I got it.

MR. CREMONA: Thank you, Your Honor.

THE COURT: Let me hear from Mr. Bell.

MR. BELL: Your Honor, Kevin Bell for the Securities Investor Protection Corporation. In the words of

Lawrence Peter Berra (ph), déjà vu all over again, you know, Valentine's Day 2014, back in September, October and November 2010, at the appellate argument before Judge Englemeier (ph) 13 days ago. When will it stop?

We have one case that's ready for trial. You asked if we go back to that transcript on Valentine's Day 2014. You asked the question of Mr. Cremona, when will it end. You know, we're going to go to the lowest common denominator. We have 57 cases. I'm glad Mr. Schweb put a dollar to them. The trustee has 514 good faith cases where he's seeking about $1.15 billion. To money you have said in the Merkin (ph) decision essentially strict liability. We've had antecedent debt three or four times decided.

Clearly, this is $1.15 billion that the trustee doesn't have to give to those poor folks who didn't get their money back. This is all fictitious profits these folks have. People didn't get their principal. Today is day 2,486 in the Madoff saga and it's 2,486 days that these folks do not have the fictitious profits that the clients of these lawyers have. There are 57 cases. Some of them haven't even moved to a case management order.

Your Honor, SiPC supports the trustee's position.

THE COURT: All right. Thank you.

I've heard enough.

Look, you can make your motion. I think you're

going to be hard-pressed to convince me that you have any further right to be heard, at least in this Court on the antecedent debt issue. I don't know what you have in mind, Mr. Levy. If you have something to say, I'll hear it obviously.

MR. LEVY: Thank you, Your Honor.

THE COURT: And I don't think that Rule 24 is intended to give you a fast track to the Second Circuit where you have your own case and can litigate your own issues.

I'm not going to enter a final judgment in this case. I'm just going to make recommendations to the District Court unless Mr. Cohen changes his mind and consents to the entry of the final judgment.

But, you know, you can make your motion. I'm not going to permit anybody to ask any questions or intervene in a trial proceeding. This is really a post-trial issue.

Another point that nobody raised, which you should bear in mind, is if an issue doesn't arise in the Cohen case, or Mr. Cohen for some reason decides to wait either expressly or implicitly by not raising it, I'm not going to hear other parties on that issue. It's not going to be decided. So bear that in mind.

And maybe particularly on the interest issue it makes sense to see what issues the trustee does raise. The

trustee may decide, you know what, the interest doesn't matter in this case. They're telling me the guy doesn't have a million dollars anyway, so it doesn't make a difference if I get a judgment for a million dollars or two million dollars or three million dollars. So I'm not going to decide that issue if that's the track the trustee takes.

But go ahead and make your motion. As I say, it doesn't have to be decided before the trial anyway because the trial is going to go forward unless the case is settled.

MR. CREMONA: Your Honor, we just wanted to understand the timing because we're obviously under compressed timing.

THE COURT: It's not going to effect the trial. At most it will affect post-trial proceedings, and I really have to know what the issues that are raised and are going to be decided in the trial before I even consider what they can intervene in.

MR. CREMONA: I fully understand that, Your Honor. I don't necessarily think that it's right, but I'm just thinking how do we deal with that effectively while we're on trial or preparing for trial.

THE COURT: Well, you try your case.

MR. CREMONA: And then we'll just -- we'll deal with this entirely post-trial?

THE COURT: Yeah. You try your case and Mr. Cohen

may win, in which case all of this is academic, or Mr. Cohen, as I said, may decide to waive issues in which case I won't hear particular issues. You may decide not to press certain issues. And I -- as I said, I have a serious question about whether Rule 24 is -- which is obviously designed at least in the case of the antecedent debt issue to get a fast track to the Second Circuit is an appropriate use of Rule 24 because once the issues have been decided, they've been decided and there's no need to intervene on those particular issues.

MR. CREMONA: Understood. Thank you, Your Honor.

THE COURT: Okay. Thank you.

(Chorus of thank you)

(Whereupon, proceedings concluded at 10:53 a.m.)

CERTIFICATION

I, Sherri L. Breach, certify that the foregoing transcript is a true and accurate record of the proceedings.

Sherri L Breach

Digitally signed by Sherri L Breach
DN: cn=Sherri L Breach, o, ou, email=digital1@veritext.com, c=US
Date: 2015.10.01 12:20:03 -04'00'

Sherri L. Breach

AAERT Certified Electronic Reporter & Transcriber CERT*D-397

Date: September 30, 2015

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

EXHIBIT 2

From: Gregory Schwed
Sent: Friday, September 11, 2015 2:22 PM
To: 'jrollinson@bakerlaw.com'; 'ncremona@bakerlaw.com'; 'owang@bakerlaw.com'
Cc: Paul Z. Lewis - Lewis & McKenna (PLewis@lewismckenna.com); ggoett@lewismckenna.com; Richard A Kirby (richard.kirby@bakermckenzie.com); Clinton, Laura K (Laura.Clinton@bakermckenzie.com); Daniel B. Besikof
Subject: Madoff – Picard v. Cohen - Adv. No. 10-04311 (SMB)

We represent various good-faith defendants in avoidance actions brought by the Trustee. It's recently come to our attention that the above-referenced adversary proceeding is scheduled for trial on October 14-16, 2015. See Revised Joint Pretrial Order dated August 28, 2015 (Dkt. No. 11154; 080-1789-SMB).

The Pretrial Order indicates that the issues to be tried include the applicability and nature of (1) the "value" defense and (2) prejudgment interest, if any.

These are issues that vitally affect our clients (and many other good-faith defendants). On behalf of our clients (and speaking for certain other similarly situated counsel who we have been in contact with), we ask if the Trustee would consent to our motion to intervene in this case.

We would seek to intervene only for the limited purpose of having an opportunity to brief these legal issues. Our intervention would have no effect on the trial schedule, or the trial witnesses or exhibits. (According to the Pretrial Order, it appears as if any briefing would take place only after the trial itself.)

Defendant has consented to such an intervention.

Needless to say, I'm happy to discuss the matter or provide more information, at your request.

Greg Schwed
Loeb & Loeb LLP
345 Park Avenue
New York, NY 10154
Tel: 212-407-4815
Fax: 212-937-4689

EXHIBIT 3

From: Cremona, Nicholas [mailto:ncremona@bakerlaw.com]
Sent: Monday, September 14, 2015 9:59 AM
To: Gregory Schwed; Rollinson, James H.; Wang, Ona Theresa
Cc: Paul Z. Lewis - Lewis & McKenna (PLewis@lewismckenna.com); ggoett@lewismckenna.com; Richard A Kirby (richard.kirby@bakermckenzie.com); Clinton, Laura K (Laura.Clinton@bakermckenzie.com); Daniel B. Besikof
Subject: RE: Madoff – Picard v. Cohen - Adv. No. 10-04311 (SMB)

Greg,

We are in receipt of your email and are considering your request. We expect to provide a response later this week. In the meantime, it would be helpful for the Trustee if you could identify the defendants on whose behalf you are seeking to intervene and the particular cases you are seeking to join to the Cohen proceeding. In addition, it would also be helpful if you could identify the similarly situated counsel you have been in contact with, the defendants they represent and which cases they are seeking to join to this proceeding to assist us in considering the scope of your request.

We look forward to hearing from you.

Thank you,
Nick

Nicholas J. Cremona | **BakerHostetler**
45 Rockefeller Plaza | New York, NY 10111-0100
T 212.589.4682 | F 212.589.4201
ncremona@bakerlaw.com

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Sent: Monday, September 14, 2015 2:13 PM
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Cc: Paul Z. Lewis - Lewis & McKenna (PLewis@lewismckenna.com); ggoett@lewismckenna.com; Richard A Kirby (richard.kirby@bakermckenzie.com); Clinton, Laura K (Laura.Clinton@bakermckenzie.com); Daniel B. Besikof
Subject: RE: Madoff – Picard v. Cohen - Adv. No. 10-04311 (SMB)

Nick,

Given that today and tomorrow are Rosh Hashana and several members of our group are observant, our response to your requests will likely be later in the week.

Greg Schwed
Loeb & Loeb LLP
345 Park Avenue
New York, NY 10154
Tel: 212-407-4815
Fax: 212-937-4689

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45 Rockefeller Plaza | New York, NY 10111-0100
T 212.589.4682 | F 212.589.4201
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345 Park Avenue
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Tel: 212-407-4815
Fax: 212-937-4689

EXHIBIT 5

From: Gregory Schwed
Sent: Thursday, September 17, 2015 7:16 PM
To: Cremona, Nicholas; Rollinson, James H.; Wang, Ona Theresa
Cc: Paul Z. Lewis - Lewis & McKenna (PLewis@lewismckenna.com); ggoett@lewismckenna.com; Richard A Kirby (richard.kirby@bakermckenzie.com); Clinton, Laura K (Laura.Clinton@bakermckenzie.com); Daniel B. Besikof
Subject: Re: Madoff – Picard v. Cohen - Adv. No. 10-04311 (SMB)

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> **From:** Cremona, Nicholas [mailto:ncremona@bakerlaw.com]
> **Sent:** Monday, September 14, 2015 9:59 AM
> **To:** Gregory Schwed; Rollinson, James H.; Wang, Ona Theresa
> **Cc:** Paul Z. Lewis - Lewis & McKenna (PLewis@lewismckenna.com); ggoett@lewismckenna.com; Richard A Kirby (richard.kirby@bakermckenzie.com); Clinton, Laura K

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Subject: RE: Madoff – Picard v. Cohen - Adv. No. 10-04311 (SMB)

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Sent: Friday, September 18, 2015 3:52 PM
To: Gregory Schwed
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From: Gregory Schwed
Sent: Sunday, September 20, 2015 9:12 AM
To: Cremona, Nicholas
Cc: Paul Z. Lewis - Lewis & McKenna (PLewis@lewismckenna.com); ggoett@lewismckenna.com; Richard A Kirby (richard.kirby@bakermckenzie.com); Clinton, Laura K (Laura.Clinton@bakermckenzie.com); Daniel B. Besikof; Rollinson, James H.; Wang, Ona Theresa
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EXHIBIT 8

From: Cremona, Nicholas [mailto:ncremona@bakerlaw.com]
Sent: Monday, September 21, 2015 12:21 PM
To: Gregory Schwed
Cc: Paul Z. Lewis - Lewis & McKenna (PLewis@lewismckenna.com); ggoett@lewismckenna.com; Richard A Kirby (richard.kirby@bakermckenzie.com); Clinton, Laura K (Laura.Clinton@bakermckenzie.com); Daniel B. Besikof; Rollinson, James H.; Wang, Ona Theresa
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FRE 408 - SETTLEMENT COMMUNICATION

Greg,

As an initial matter, you have not provided us with the defendants and corresponding cases for whom your group seeks intervention so we are unable to fully evaluate the scope of your request. As a result, we must presume that the "usual group" includes all those defendants that have already participated in the antecedent debt proceedings before Judge Rakoff and again in the omnibus good faith proceeding before Judge Bernstein. Moreover, Pryor Cashman and Dentons also participated in consolidated briefing on this same exact issue before Judge Rakoff in the Greiff matter. Judge Bernstein has already indicated that these same defendants were likely bound by the Greiff decision and should have been estopped from rearguing in the motion to dismiss proceeding. Clearly, as a result, those same parties are all now bound by the Judge's June 2 decision on the antecedent debt issue and should not be permitted to reargue that exact same issue yet again, and presuming it is even briefed here, it will be in the context of the facts and circumstances of Andrew Cohen's relationship with BLMIS. Similarly, with respect to whether prejudgment interest is appropriate in the context of the Cohen case is within Judge Bernstein's discretion based on the facts and circumstances of Mr. Cohen's case, which is certainly not uniform to all defendants seeking to join, whoever they may be.

Notwithstanding, the request is also inconsistent with Judge Bernstein's numerous statements on the record that these adversary proceedings simply cannot all proceed at the same pace otherwise the Court will be unable to issue a ruling unless every last defendant has been heard on that issue. These cases simply cannot move forward in that fashion given the varying procedural postures of all the cases seeking to join.

In addition, the request is premature since Judge Bernstein has not indicated that any briefing on antecedent debt, prejudgment interest, or any issue for that matter, will be required in the context of the Andrew Cohen trial. At a minimum, the parties should determine how the Judge intends to proceed before we can evaluate whether your request is even ripe.

These are some of the reasons why the Trustee believes your request is inappropriate at this time and withholds his consent.

The Trustee obviously reserves the right to assert additional arguments in opposition to your intervention motion to the extent you decide to file it at this time.

Lastly, in response to your message, the Trustee is generally available to have a conference with the Court tomorrow if that works for your collective schedules, however, we reiterate our request for the list of relevant defendants/cases so we can fully evaluate the scope of your request in advance of our chambers conference.

Best regards,

Nick

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EXHIBIT 9

P. GREGORY SCHWED
Partner

345 Park Avenue
New York, NY 10154

Direct 212.407.4815
Main 212.407.4000
Fax 212.937.4689
gschwed@loeb.com

Via ECF and email (bernstein.chambers@nysb.uscourts.gov)

September 24, 2015

Honorable Stuart M. Bernstein
United States Bankruptcy Court
One Bowling Green
New York, NY 10004

Re: SIPC v. Bernard L. Madoff Investment Securities LLC, (Adv. Pro. No. 08-01789) (SMB) – Picard v. Cohen (Adv. Pro. No. 10-04311 (SMB))

Dear Judge Bernstein:

The undersigned attorneys represent former customers ("Customers") of debtor, Bernard L. Madoff Investment Securities LLC. The Trustee brought adversary proceedings against Customers, in which he seeks to avoid prior transfers to Customers, either as initial or subsequent transferees. The Trustee has repeatedly conceded that Customers acted in good faith when they received the transfers at issue. All Customers have asserted in their respective answers one or more defenses raising legal issues common to the defenses asserted in the above-referenced *Cohen* adversary proceeding.

Pursuant to Rule 7024 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") and Section 6(A) of the Litigation Procedures Order (Dkt No. 3141, dated November 10, 2010), Customers seek leave to file a motion to intervene as defendants in the *Cohen* adversary proceeding for the purpose of addressing the common legal issues that transcend the *Cohen* case and apply equally to their own pending adversary proceedings. Specifically, Customers want to be heard on two critical common legal issues raised in *Cohen*. The first is the scope of the "value" defense under Section 548(c), which permits a Customer to retain amounts that can be shown to have provided value to the debtor at the time of each alleged transfer under substantive non-bankruptcy law, including defense theories involving the satisfaction of antecedent debts or obligations; the adjustment of "value" conferred by Customers to reflect "constant dollars" or inflation; and the effect of unavoidable obligations incurred by the Debtor. The second issue is the availability and, if allowed, the rate and computation of prejudgment interest if a money judgment is entered against a defendant in an adversary proceeding.

Under the Federal Rules of Civil Procedure, a motion to intervene under Rule 24 is the proper procedural vehicle for Customers to seek leave to address common legal issues that vitally affect multiple cases. Customers recognize that this Court and the District Court have already addressed the scope of the value defense in prior proceedings. Each of those rulings, however, was made in the context of a preliminary motion to dismiss. Customers believe that the *Cohen* case will be the first instance where the Court will address the defense on its merits at trial. Likewise, Customers believe that the prejudgment interest question has not been litigated in

these proceedings. Because these issues transcend the individual case and will affect Customers' own adversary proceedings, Customers seek to be heard on these issues now, at a point where their input could affect the outcome.

Further, if the *Cohen* case becomes the lead case to test the scope of the value defense or the prejudgment interest question in the Madoff proceedings, Customers wish to be heard with all the rights of a party in the district court and the court of appeals. The Second Circuit has reiterated that, regardless of the court's own views of the merits of the issue on which intervention is sought, the right to be heard on such an issue at a meaningful time is independent of the merits of the legal issues presented. *See Oneida Indian Nation v. New York*, 732 F.2d 261, 265 (2d Cir. 1984) ("[E]xcept for allegations frivolous on their face, an application to intervene cannot be resolved by reference to the ultimate merits of the claims which the intervenor wishes to assert following intervention.") (citations omitted).

Customers recognize that Mr. Cohen and the Trustee will need to make a specific factual record as to how much the value defense permits him to reduce the Trustee's claims. Customers ask for no role in the development of that factual record. Thus, intervention will not delay the trial of this case, which would presumably unfold as planned in the August 28 Revised Joint Pretrial Order. Dkt. No. 11154. Customers' request is limited to the opportunity to be involved in any pre-trial or post-trial briefing, and related oral argument, where the merits of the common legal issues are addressed by the Court.

The Second Circuit has made clear that, even when a pending litigation may not directly bind the proposed intervenor, intervention as of right is required if "there is a substantial likelihood that the claims and interests of the proposed intervenors … may be adversely affected at least by principles of stare decisis, arising out of the final judgment to be entered in this case." *Oneida,* 732 F.2d at 265. Customers note that the amount in controversy in the *Cohen* matter is only $1.1 million. Thus, practical limitations on the resources of a single defendant may prevent or limit the effort that such a defendant can devote to these discrete issues. By contrast, Customers have many millions at stake on these two issues and are heavily motivated to vigorously pursue a final resolution. A final decision by this Court (and the appellate courts) made without Customers' participation could functionally impair Customers' ability to pursue the "value" defense in their cases. In the context presented here, intervention is appropriate.

Customers only recently learned of the *Cohen* case trial setting, and promptly thereafter requested the parties' consent to intervention on the two issues outlined above. Although the defendant has consented – indeed, welcomes Customers' intervention – both the Trustee and SIPC refused to do so. The Trustee's main expressed reason for refusing is that the "facts and circumstances" of the *Cohen* defendant's case may not be "uniform" with respect to all Customers seeking to intervene. While the specific facts of each adversary proceeding may differ, the relevant legal issues for any good-faith defendant do not. Customers accordingly view as mere pretext the Trustee's contention that the scope of the legal defenses or the treatment of prejudgment interest could conceptually differ from one good-faith defendant to another.

For all these reasons, intervention is fully warranted, both as of right under Bankruptcy Rule 7024(a)(2) and permissively under Rule 7024(b)(1)(B). Customers are prepared to brief these issues on an expedited basis to suit the Court's schedule. Moreover, intervention will promote efficient judicial administration by allowing these common issues to be addressed on a unified, rather than piecemeal, basis. Intervention is consistent with the consolidated briefing of other key issues affecting multiple defendants, such as the application of the "securities contract/settlement payment" defense of Bankruptcy Code Section 546(e) and the question of the Trustee's standing. Indeed, Judge Rakoff previously recognized that "value" defense issues merited consolidated proceedings. This efficient and equitable practice should be continued here.

Counsel for the Customers are available for further discussion of the matter with the Court, and can submit such other information as may be helpful for the disposition of this request.

Respectfully submitted,

P. Gregory Schwed*
Partner

BAKER & MCKENZIE LLP*

By: /s/
Richard A. Kirby – Tel: (202) 452-7020
Email: richard.kirby@bakermckenzie.com

MILBERG LLP*

By: /s/
Matthew A. Kupillas – Tel: (212) 613-5697
Email: mkupillas@milberg.com

DENTONS*

By: /s/
Carole Neville – Tel: (212) 768-6889
Email: carole.neville@dentons.com

PRYOR CASHMAN LLP*

By: /s/
Richard Levy Jr. – Tel: (212) 326-0886
Email: rlevy@pryorcashman.com

cc: Nicholas Cremona, Esq. (ncremona@bakerlaw.com)
Baker & Hostetler
(Counsel for the Trustee)

Kevin Bell, Esq. (SIPC) (kbell@sipc.org)

Paul Z. Lewis, Esq. (PLewis@lewismckenna.com)
Lewis & McKenna
(Counsel for defendant, Andrew Cohen)

*See Annex A for list of clients and adversary proceedings.

ANNEX A

ADVERSARY CASES HANDLED BY LOEB & LOEB LLP

Case Name	Docket Number
Picard v. Kenneth Evenstad Trust, et al.	10-4342
Picard v. Kenneth Evenstad Trust, et al.	10-4933
Picard v. Mark Evenstad Trust, et al.	10-4512
Picard v. MBE Preferred Ltd Partnership, et al.	10-4952
Picard v. Serene Warren Trust, et al.	10-4514
Picard v. SEW Preferred Ltd Partnership, et al.	10-4945

ADVERSARY CASES HANDLED BY BAKER & McKENZIE LLP

Case Name	Docket Number
Picard v. Lanx	10-4384
Picard v. Lowery	10-4387
Picard v. South Ferry	10-4488
Picard v. South Ferry	10-4350
Picard v. ZWD	10-4374

ADVERSARY CASES HANDLED BY DENTONS US LLP

Case Name	Docket Number
Picard v. Alvin Gindel Revocable Trust, et al.	10-4925
Picard v. America-Israel Cultural Foundation	10-5058
Picard v. BAM L.P., et al.	10-4401
Picard v. Barbara Berson	10-4415
Picard v. Estate of Jack Shurman, et al.	10-5028
Picard v. Eugene J. Ribakoff 2006 Trust, et al.	10-5085
Picard v. Laura E. Giggenheimer Cole	10-4882
Picard v. Sidney Cole	10-4672
Picard v. The Federica Ripley French Revocable Trust, et al.	10-5424
Picard v. James Greiff	10-4357
Picard v. Harold Hein	10-4861
Picard v. Toby T. Hobish, et al.	10-5236
Picard v. Ida Fishman Revocable Trust, et al.	10-4777
Picard v. Joel I. Gordon Revocable Trust	10-4615
Picard v. Lapin Children LLC	10-5209
Picard v. David Markin, et al.	10-5224

Picard v. Stanley Miller	10-4921
Picard v. The Murray Family Trust, et al.	10-4510
Picard v. Neil Reger Profit Sharing Keogh, et al.	10-5424
Picard v. Rose Gindel Trust, et al.	10-4401
Picard v. S&L Partnership, et al.	10-4702
Picard v. Barry Weisfeld	10-4332

ADVERSARY CASES HANDLED BY MILBERG LLP

Case Name	Docket Number
Picard v. Gary Albert	10-4966
Picard v. Aspen Fine Arts Co.	10-4335
Picard v. Gerald Blumenthal	10-4582
Picard v. Norton A. Eisenberg	10-04576
Picard v. Elbert R. Brown Trust, et al.	10-5398
Picard v. The Estate of Ira S. Rosenberg, et al.	10-4978
Picard v. P. Charles Gabriele	10-4724
Picard v. Stephen R. Goldenberg	10-04946
Picard v. Ruth E. Goldstein	10-04725
Picard v. The Joseph S. Popkin Revocable Trust, et al.	10-4712
Picard v. Potamkin Family Foundation I, Inc.	10-5069
Picard v. Mitchell Ross	10-4723
Picard v. Richard Roth	10-5136
Picard v. Jonathan Sobin	10-4540
Picard v. Harold A. Thau	10-4951
Picard v. The William M. Woessner Family Trust, et al.	10-4741

ADVERSARY CASES HANDLED BY PRYOR CASHMAN LLP

Case Name	Docket Number
Picard v. Patrice M. Auld, et al.	10-4343
Picard v. Bernard Marden Profit Sharing Plan, et al.	10-5429
Picard v. Abraham J. Goldberg, et al.	10-5439
Picard v. Charlotte Marden Irrevocable Trust, et al.	10-5118
Picard v. James P. Marden, et al.	10-4341
Picard v. Marden Family Limited Partnership, et al.	10-4348
Picard v. Murray Pergament Trust, et al.	10-5194
Picard v. Stanley Plesent	10-4375

EXHIBIT 10

BakerHostetler

Baker&Hostetler LLP

45 Rockefeller Plaza
New York, NY 10111

T 212.589.4200
F 212.589.4201
www.bakerlaw.com

Nicholas J. Cremona
Direct dial: 212.589.4682
ncremona@bakerlaw.com

September 25, 2015

VIA ECF AND ELECTRONIC MAIL TO
bernstein.chambers@nysb.uscourts.gov

Honorable Stuart M. Bernstein
United States Bankruptcy Court
Southern District of New York
One Bowling Green, Room 723
New York, New York 10004-1408

Re: *Securities Investor Corporation v. Bernard L. Madoff Investment Securities LLC*, Ad. Pro. No. 08-01789 (SMB) – *Picard v. Cohen* (Adv. Pro. No. 10-04311) (SMB)

Dear Judge Bernstein:

We are counsel to Irving H. Picard, trustee (the "Trustee") for the substantively consolidated liquidation proceedings of Bernard L. Madoff Investment Securities LLC and the estate of Bernard L. Madoff under the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.* ("SIPA").

We write in response to a letter dated September 24, 2015 submitted to Your Honor by Loeb & Loeb LLP, Baker & McKenzie LLP, Milberg LLP, Dentons US LLP, and Pryor Cashman LLP on behalf of certain defendants in adversary proceedings ("Defendants"). Defendants seek leave under the Litigation Procedures Order (ECF No. 3141), to move to intervene as defendants in the *Cohen* adversary proceeding ("Request to Intervene") on two legal issues: (1) the scope of the "value defense" under Section 548(c) of the Bankruptcy Code and (2) the availability and the rate and computation of prejudgment interest if a money judgment is entered against a defendant. As discussed below, Defendants are and have been more than fairly and adequately heard or represented on legal issues affecting their cases. If granted, the Request to Intervene would result in a procedurally improper motion that would cause prejudice and delay to both the Trustee and the net loser victims.

As a threshold matter, the Request to Intervene is improper because it is predicated on the false premise that there is a "value" defense in fictitious profits cases – which there is not – and that such issue will be briefed yet again in the context of this or any other adversary proceeding to recover fictitious profits. These Defendants have unsuccessfully litigated the "value" issue numerous times already in this liquidation proceeding starting as early as June 24, 2011 as grounds for withdrawal of the reference to the

Bankruptcy Court,[1] and were subsequently raised again in motions to dismiss beginning in November 11, 2011.[2] The District Court considered and rejected every single "value" defense articulated in the Request to Intervene in two prior decisions. First, in *Picard v. Greiff,* 476 B.R. 715, 725 (S.D.N.Y. 2012), which resolved motions to dismiss filed by the same Defendants represented by three of the signatories to the Request to Intervene, namely Milberg LLP, Dentons, and Pryor Cashman LLP; the District Court concluded that transfers from BLMIS that "exceeded the return of defendants' principal, *i.e.*, that constituted profits, were not 'for value.'" Subsequently, Judge Rakoff considered and rejected each and every one of the "value" arguments raised by these Defendants – all of whom participated in the consolidated proceeding in the District Court – a second time when that Court held any such claims "did not provide value as against the BLMIS customer property estate under SIPA." *In re Madoff Sec.*, 499 B.R. 416, at 422 n. 6 (S.D.N.Y. 2013) ("Antecedent Debt Decision"). Notwithstanding, these very same Defendants – for the third time – asserted the exact same arguments in the Omnibus Good Faith Motions to Dismiss before this Court. Defendants improperly assert that the value analyses exhausted by this Court and the District Court could not have been sufficiently substantive but in Your Honor's decision issued on June 2, 2015, this Court made matters unequivocally clear when it held that "[t]hose moving defendants that participated in the withdrawal of the reference of the antecedent debt/value issue have had their day in court and Judge Rakoff's decisions are law of the case."[3]

As for the prejudgment interest issue, Your Honor has recognized that such interest is generally available in avoidance actions, and whether it is appropriate in any case such as the *Cohen* matter, is based on the specific facts and circumstances of that case, and is within the full discretion of the Court. *See e.g., In re Teligent, Inc.*, 380 B.R. 324, 344 (Bankr. S.D.N.Y. 2008) (Bernstein, C.J.) (citing *Hechinger Inv. Co. of Del., Inc. v. Universal Forest Prods., Inc. (In re Hechinger Inv. Co. of Del., Inc.),* 489 F.3d 568, 579–80 (3d Cir. 2007)). These Defendants have no standing to argue whether prejudgment interest is appropriate in the *Cohen* case, under those unique facts to be demonstrated at trial, which include transfers from Mr. Cohen's BLMIS accounts and what Mr. Cohen may have done with the proceeds of such transfers. Since these Defendants will not be bound by any finding of this Court concerning prejudgment interest based on those unique facts and circumstances determined at trial, they will likewise not be prejudiced in any way. Indeed, these Defendants will have their day in court to argue whether any such prejudgment interest is appropriate in their individual adversary proceedings consistent with the Litigation Procedures Order, *i.e.*, after discovery and mediation of their individual case.

To grant the Request to Intervene would mean the *Cohen* case— a case that is trial ready under the Litigation Procedures Order—"can't move any faster than the slowest case," especially given that some of

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[1] *See e.g., Picard v. Blumenthal*, No. 11- Civ-04293 (JSR) (S.D.N.Y. June 24, 2011), ECF No. 2 (Milberg LLP); *Picard v. Goldman*, No. 11-Civ-04959 (JSR) (S.D.N.Y. July 19, 2011), ECF No. 2 (Pryor Cashman LLP); *Picard v. Hein*, No. 11- Civ-04936 (JSR) (S.D.N.Y. July 19, 2011), ECF No. 1-1 (Dentons).

[2] *See e.g., Picard v. Blumenthal*, No. 11- Civ-04293 (JSR) (S.D.N.Y. Nov. 11, 2011), ECF No. 15-1 (Milberg LLP); *Picard v. Goldman*, No. 11- Civ-04959 (JSR) (S.D.N.Y. Jan. 4, 2014), ECF No. 24 (Pryor Cashman LLP); *Picard v. Hein*, No. 11-Civ-04936 (JSR) (S.D.N.Y. Jan. 4, 2014), ECF No. 19 (Dentons).

[3] *In re Madoff Sec.*, 531 B.R. 439, 466 (Bankr. S.D.N.Y. 2015) ("Omnibus Good Faith Decision") citing *Antecedent Debt Decision*, 499 B.R. at 430.

Defendants' cases have not yet entered discovery.[4] This would further prevent Your Honor from deciding any issue until every last defendant is heard on any particular issue. As Your Honor has previously noted on the record several times, it is simply not feasible for a case of this magnitude to efficiently proceed in that manner.

The trial in *Cohen* has been scheduled so that the Trustee may make a factual record proving the elements of his claim under Bankruptcy Code section 548(a)(1)(A), and for Mr. Cohen to have the opportunity to challenge the Trustee's proof. This is not a forum for Mr. Cohen, or any of the Defendants, to raise frivolous legal arguments that have been foreclosed by the law of this case. This is especially true for Mr. Cohen, who participated in the consolidated briefings and is bound by the Antecedent Debt Decision. *See Omnibus Good Faith Decision,* 531 B.R. at 466 citing *Antecedent Debt Decision,* 499 B.R. at 430 (noting the mandate from the District Court concerning the "value" issues). The Trustee submits that to allow the Request to Intervene would facilitate an abuse of the judicial process and cause unnecessary delay and prejudice. Indeed, it would highly prejudicial to the Trustee's trial preparation to have to engage in an immediate and compressed briefing schedule at this late stage to address the merits of the Request to Intervene.

In addition, to be clear, the Revised Joint Pretrial Order in the *Cohen* matter establishing the trial schedule was not only filed in the adversary proceeding (ECF No. 55), but also in the main bankruptcy docket as of August 28, 2015 (ECF No. 11154). In addition, the notices of the final pre-trial conference were similarly filed in the main bankruptcy docket on April 29, 2015, May 18, 2015, and again on July 15, 2015 (ECF Nos. 9897, 10011, 10668). Rather than promptly making the Request to Intervene immediately after any one of these filings, Defendants waited until nearly two weeks before trial. In short, the Request to Intervene seeks to circumvent the Litigation Procedures Order, which was put in place to provide for the orderly administration of the adversary proceedings and prevent such an abuse of process. Likewise, the Request to Intervene completely disregards the law of this case as recognized by this Court.

For all these reasons, the Trustee submits there is no basis to intervene in the *Cohen* matter before this Court. We are available to discuss any questions regarding the foregoing.

The Securities Investor Protection Corporation has informed us that it joins in this letter.

Respectfully submitted,

/s/ Nicholas J. Cremona

Nicholas J. Cremona

cc (via email):
David J. Sheehan
Kevin H. Bell

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[4] *See* Hearing Re: Conference Re: Request for Consolidated Briefing, at 41:8-15, *In re Madoff Sec.*, Adv. Pro. No. 08-01789 (SMB) (Bankr. S.D.N.Y. Feb. 14, 2014).

P. Gregory Schwed
Richard A. Kirby
Matthew A. Kupillas
Carole Neville
Richard Levy